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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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PENSION BENEFIT GUARANTY CORPORATION,
*Petitioner*,

v.

REORGANIZED CF&I FABRICATORS OF UTAH, INC., *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

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RICHARD M. SELTZER
*Counsel of Record*
BABETTE A. CECCOTTI
ANN E. O'SHEA
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, NY 10036
(212) 563-4100

CARL B. FRANKEL
*General Counsel*
PAUL WHITEHEAD
*Assistant General Counsel*
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222
(412) 562-2400

*Attorneys for the United Steelworkers of America, AFL-CIO-CLC*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether the bankruptcy claim of the Pension Benefit Guaranty Corporation ("PBGC") for unpaid minimum funding contributions is a prepetition claim arising from the prepetition services of employees, as opposed to an administrative expense claim.

2. Whether the bankruptcy claim of the PBGC for unfunded future benefit liabilities is properly calculated utilizing a discount rate establishing the claim's value "as of the date of the filing of the petition" pursuant to 11 U.S.C. § 502(b), as opposed to utilizing a discount factor prescribed by the PBGC which artificially inflates the claim for institutional purposes?

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## BRIEF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC IN OPPOSITION

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Respondent United Steelworkers of America, AFL-CIO-CLC ("USWA") submits this brief in opposition to the petition for a writ of certiorari filed by the Pension Benefit Guaranty Corporation ("PBGC").

## STATEMENT

### 1. Role of the United Steelworkers of America

The USWA is a labor organization with over 750,000 members. For decades, the USWA served as the collective bargaining representative of the vast majority of the

employees of CF&I Steel Corporation ("CF&I" or the "Debtor") in Pueblo, Colorado. The USWA bargained for and obtained comprehensive pension and health insurance programs enabling CF&I employees to earn vital retirement benefits.

The USWA was a key participant in the Chapter 11 bankruptcy of CF&I and its nine wholly-owned subsidiaries (collectively the "Debtors") filed in 1990. It preserved jobs by negotiating a new collective bargaining agreement ("CBA") with the purchaser of CF&I's assets. The USWA also served as the "authorized representative" of most of CF&I's retirees and their surviving spouses in negotiations over the modification of their right to lifetime retiree medical benefits. *See* 11 U.S.C. § 1114(b)(1). As authorized representative, the USWA negotiated, as part of a plan of reorganization ("POR"), the creation of a Voluntary Employees Beneficiary Association ("VEBA")[1] to provide ongoing, albeit reduced, medical and life insurance benefits.[2]

The POR created three Appeal Funds which will be distributed to either the PBGC or the VEBA and unsecured creditors depending on whether the PBGC ulti-

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[1] *See* Internal Revenue Code ("IRC") Section 501(c)(9), 26 U.S.C. § 501(c)(9).

[2] Claims for future medical benefits for retirees, who are also beneficiaries of the pension plan at issue, were settled by the funding of the VEBA. Retirees continued to receive retiree medical benefits during the bankruptcy pursuant to Bankruptcy Code Section 1114, 11 U.S.C. § 1114. Subsection 1114(e)(1) requires the continuation of such payments in the absence of a court-ordered modification, and Subsection 1114(e)(2) specifically defines such payments as administratve expenses ("any payment for retiree benefits required to be made before a plan confirmd under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title."). *See* ***infra***, p. 18.

mately prevails with regard to the issues relating to the respective Appeal Funds. Pet. App. 13a n.6; C.A. Aplt. App. 61-64.

**2. The PBGC and The Pension Insurance Program**

The PBGC is a government corporation established to administer ERISA's pension-plan insurance and termination provisions. 29 U.S.C. §§ 1301-1461. The PBGC may move unilaterally at any time to terminate pension plans for various reasons, including a sponsor's failure to make minimum funding contributions or if "the risk to the insurance program may increase unreasonably if the plan is not terminated." Pet. 5; 29 U.S.C. § 1342(a).[3]

When a pension plan is terminated by the PBGC, the PBGC assumes the plan sponsor's payment obligations to the extent and amount of the PBGC's statutory payment guarantees for nonforfeitable benefits. 29 U.S.C. § 1322(a).[4] This is a "mandatory Government insurance program." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 637 (1990).

Following a termination, the PBGC acquires a right to recover from the plan sponsors the plan's "Unfunded Benefit Liability" ("UBL"). The UBL claim is defined "for purposes of" Title IV of ERISA as the present value of future benefits earned by current and former employees under the plan, to the extent the pen-

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[3] *See, e.g., Jones & Laughlin Hourly Pension Plan* v. *LTV Corp.*, 824 F.2d 197 (2d Cir. 1987) (court upholds PBGC termination of pension plans, rejecting action by USWA seeking to block termination).

[4] There are limitations to the PBGC's guarantee, including a maximum monthly benefit, a phase-in rule for benefits adopted within five years of the termination, and no guarantee for benefits that become vested only because of the plan termination. 29 U.S.C. § 1322(a), (b); *see genrally PBGC* v. *LTV Corp.*, 496 U.S. 633 637-38 (1990).

sion trust fund assets are insufficient to pay for these benefits. 29 U.S.C. §§ 1301(a)(16), 1301(a)(18), 1362(b); C.A. Aplt. App. 49. The PBGC, in its capacity as successor trustee of a terminated plan, also acquires a right to recover from the sponsor unpaid "Minimum Funding Contributions." 29 U.S.C. § 1362(c). This "contribution" claim is equal to the difference between the amount that a plan's enrolled actuary certifies that a sponsor should contribute to the plan to amortize the funding obligation for past and current benefit accruals and the amounts actually contributed. C.A. Aplt. App. 41-42.

The PBGC obtains its revenues from employer premiums, investment income, assets collected from terminated plans, and recoveries on claims against sponsors of terminated plans. Pet. 4. While asserting that its insurance program has historically operated at a financial deficit, PBGC also acknowledges that it closed 1996 and 1997 very much in the black. Pet. 19. Indeed, since the filing of the Petition, the PBGC announced a year-end surplus for 1998 of $5.012 billion in the relevant single-employer plan program, following year-end surpluses achieved in 1997 and 1996 in the same program of $3.481 billion and $869 million, respectively.[5] These surpluses were

[5] *See* 1998 PBGC Ann. Rep. 2 (in the last five years "PBGC has built a strong insurance program and solid financial foundation through hard work and sound management."); 1997 PBGC Ann. Rep. 3 ("We have achieved a surplus which can serve as a cushion to protect workers and retirees *in the event of a future economic downturn*." (emphasis added)); 1996 PBGC Ann. Rep. 1 ("While pension underfunding increased in 1995 in large part because of a decline in interest rates, reforms for premiums paid by underfunded plans increased premium revenues by more than 35 percent to nearly $1.2 billion to keep the insurance program strong. Other reforms from the Retirement Protection Act of 1994 *are in place to address the underfunding over time*." (Emphasis added)).

PBGC's assertion that it has suffered a "loss of nearly a quarter billion dollars" as a result of the events in this case, Pet. 3, is

achieved without, to USWA's knowledge, the PBGC obtaining a full recovery on its asserted UBL and contribution claims in any bankruptcy proceeding.

**3. The CF&I Bankruptcy Proceedings**

At the time of the bankruptcy filing, CF&I was the sponsor and administrator of a defined benefit pension plan (the "Master Plan"). C.A. Aplt. App. 19, 40. Pursuant to the terms of the Master Plan, CF&I promised to provide fixed pension benefits and to fund the Master Plan based on the actuarial valuation of the benefits earned by employees. C.A. Aplt. App. 19-20.

In 1988 and 1989, CF&I made required pension funding payments of $15 million and $16.603 million, respectively, and was current on all required contributions. On September 15, 1990. CF&I failed to make a minimum funding payment. Despite CF&I's compliance with the statutory funding requirements up until this date, the Master Plan was significantly underfunded, largely due to past economic downturns, reduced employment, and a resulting major increase in retirements. C.A. Aplt. App. 76.

On November 7, 1990, twenty-three days after the missed contribution, the Debtors filed Chapter 11 petitions, in large part, because of insolvency caused by their inability to fund the Master Plan. Pet. App. 81a; C.A. Aplt. App. 20, 40, 76.

On March 19, 1992, sixteen months following the bankruptcy filing, and after repeated attempts by CF&I

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misleading and incorrect, *inter alia*, because it does not refer to its overall financial status. *See also infra*, p. 23 n.34. Further, PBGC exists largely to insure the defined benefit pension system. Like any other insurance company, the PBGC collects premiums and invests its funds. The PBGC uses its assets to cover instances where it is unable to obtain a complete recovery from insolvent employers.

before and the Debtors following the bankruptcy to persuade PBGC to do so, the PBGC terminated the Master Plan, based, in part, on the Debtors' failure to make the required 1990 minimum funding payments. Pet. App. 81a-82a; C.A. Aplt. App. 20-21, 40, 68. The PBGC became liable for the benefits earned by plan participants and guaranteed by the PBGC.

The PBGC filed proofs of claim against each of the Debtors asserting: (1) the contribution claim for the period prior to termination and (2) a UBL claim. C.A. Aplt. App. 20, 40-41. The PBGC ultimately filed amended proofs of claim, asserting a Minimum Funding Claim of $64,874,511 and a UBL claim of $263,200,000 against each Debtor. The PBGC asserted that both claims were entitled to tax and administrative priority.[6] Pet. App. 82a; Aplt. App. at 21, 41. Litigation ensued on the Debtors' objections to the priority and calculation of this claim with the USWA as an active participant.

A consolidated plan of reorganization was confirmed based on a sale of substantially all of the Debtor's assets.

**4. Decisions Below**

The bankruptcy court held that the PBGC's contribution claim was not entitled to priority as postpetition administrative expenses pursuant to 11 U.S.C. § 503(b)(1)(A) (except to the extent of $1,565,198 attributable

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[6] The PBGC raised a panoply of arguments in support of such priority treatment, including assertions that tax liens "arose" postpetition despite the application of the automatic stay. 11 U.S.C. § 362. The PBGC apparently also considered these arguments key to its "mission," but has abandoned them along the way. It also chose not to petition for certiorari from the Tenth Circuit's decision in *PBGC* v. *Skeen (In re Bayly Corp.)*, 163 F.3d 1205 (10th Cir. 1998), which rejected the PBGC's assertion of tax and administrative priorities for its UBL claim.

to the postpetition labor of the Debtors' employees, *i.e.*, the "normal cost" component), because it arose from the prepetition labor of CF&I's employees and was not an actual and necessary expense of preserving the Debtors' estates. Pet. App. 67a-68a, 91a. With respect to the UBL claim, the bankruptcy court held a further hearing to determine the allowance of the claim.

PBGC representatives acknowledged in testimony that, in calculating its UBL claim, the PBGC had adopted a discount factor to approximate the cost of private annuity contracts rather than a discount rate to reflect the true economic value of the PBGC's loss. By selecting a low discount factor to reflect the group annuity market, the PBGC sought to further its institutional goal of making plan terminations less attractive than the purchase of close-out annuities. C.A. Aplee. App. 53, 68, 70, 98. These witnesses further testified that the PBGC does not invest its funds in the group annuity contracts that formed the basis of its discount factor, but rather invests in the very markets that the Debtors argued should form the basis for determining a "prudent investor" discount rate. C.A. Aplee. App. 65, 66, 91, 92, 100-102.

The bankruptcy court acknowledged that the discount factor provided in the PBGC's regulations (as applied here, 6.5%) was designed in part to enhance the PBGC's own claim and that adopting that rate "will severely impact the distribution to other similarly situated creditors." It concluded, nonetheless, that deference to the PBGC and its regulations required approval of the 6.5% factor to calculate the present value of the PBGC's UBL Claims, resulting in a claim of over $220 million (having reduced the filed UBL claim by the amount of the contribution claim). Pet. App. 72a-75a.[7]

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[7] The court rejected the Debtors' 12.3% market-based "prudent investor" discount rate, which reflected the reasonable earning

The district court affirmed the bankruptcy court's priority determinations (Pet. App. 46a-48a), but remanded the case for "an independent discount rate determination without any deference to the position of the PBGC." It concluded that "[t]he bankruptcy court applied the wrong standard of review in giving deference to PBGC's interpretation." Pet. App. 52a, 54a-55a. The district court held that "present value calculations relating to pension termination liability must be determined according to bankruptcy law." Pet. App. 51a-52a.

On remand, the bankruptcy court rejected the PBGC's discount factor and instead adopted the Debtors' 12.3% "prudent investor" discount rate, resulting in an unsecured claim of $124.441 million. Pet. App. at 27a-40a. The court held that the PBGC's discount factor "was not representative of future investment yields or any rate of return," was inconsistent with Bankruptcy Code standards of equal treatment of creditors, and served the PBGC's own "institutional goal." Pet. App. 35a-38a. The district court affirmed, concluding that the PBGC's discount factor was "creditor specific" and "inconsistent with ascertaining the true present value of the unfunded claims." Pet. App. 21a-22a.

The court of appeals affirmed the district court's decision. With regard to the contribution claim, it noted that Congress did not amend the Bankruptcy Code to provide administrative priority for contribution claims, as it did for other retiree-related bankruptcy claims in 11 U.S.C. § 1114.[8] The court of appeals held that the contribution claims were classic prepetition claims the consideration for

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power of money in a balanced portfolio, while noting that the rate was "carefully developed analyzing genally accepted source material used in financial markets." *Id.* at 73a.

[8] *See infra*, p. 18.

which was the prepetition labor of the Debtors' employees. Pet. App. 9a-13a.

In relation to the UBL claim, the court of appeals emphasized that, pursuant to 11 U.S.C. § 502(b), the claim must be discounted and valued as of the petition date. The court held that only the use of the prudent investor rate would insure "the relative equality of payment between claims that mature in the future and claims that can be paid on the date of the bankruptcy." The court concluded that the discount assumptions in regulations promulgated by the PBGC define such liabilities for purposes of ERISA only, apply to only one bankruptcy creditor, and conflict with the Bankruptcy Code's requirement that similar claims be treated alike. Pet. App. 13a-15a.

## ARGUMENT

### I. THERE IS NO COMPELLING REASON TO GRANT THE PETITION

The legal issues raised by the PBGC do not warrant a grant of the Petition. As demonstrated *infra*, there is no conflict between the decision below and decisions of this Court or other courts of appeals. Only the PBGC suggests that there is uncertainty about the priority and calculation of its bankruptcy claims. In fact, there is a telling consistency of approach and outcome by courts in considering these claims.

Perhaps recognizing the otherwise limited merits of its Petition, the PBGC emphasizes policy and financial considerations. Pet. 12-21. While the desire of the PBGC to improve its financial position is understandable, review of the issues raised in the Petition is not necessary or essential to the public interest or the PBGC's authority and ability to carry out its "mission."

First, the PBGC is not suffering financial distress. Even if the PBGC were not running so clearly in the black, this case would not involve a potential call on the public treasury. The PBGC does not operate with government funds. Pet. 4, 6.[9]

Second, this case concerns bankruptcy claims, not "significant administrative law questions." *Compare LTV*, 496 U.S. at 644. There is no issue raised in this case concerning PBGC's regulatory authority to terminate a defined benefit pension plan either: (1) during a bankruptcy, at a time of the PBGC's choosing, based on a sponsor's failure to make contributions[10] or (2) prior to bankruptcy if the necessary statutory standards are met. This Court has already upheld the PBGC's authority to restore a pension plan where there is financial improvement by an employer sponsor during the course of a bankruptcy. *Id.* There is also no issue raised about the valuation of the PBGC's claims outside of bankruptcy. This case only concerns the determination of the PBGC's claims in bankruptcy, specifically the priority of the PBGC's contribution claims and the interest rate to be utilized in allowing the PBGC's UBL claim.

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[9] The PBGC raises the spectre of "perverse economic incentives" and "abuse" resulting from the application of established rules of bankruptcy to its claims. Pet. 11, 14. These arguments miss the point. The disadvantages of bankruptcy are obvious and daunting to any entity contemplating a bankruptcy filing. However, Congress assumed that plan terminations in bankruptcy proceedings were likely and appropriate, and provided for the bankruptcy court to make determinations in regard to distress terminations. 29 U.S.C. § 1341(c)(2)(B)(i), (ii). Of course, any dissatisfaction with the current balance of competing bankruptcy interests is for Congress to resolve.

[10] Indeed, while declining to provide administrative or tax priority for PBGC's contribution claims, Congress specifically provided in ERISA that the PBGC can terminate a plan "notwithstanding" the pendency of a bankruptcy proceeding. 29 U.S.C. § 1342 (e), (f).

Congress has chosen not to enact improved priorities for the PBGC's bankruptcy claims. *See infra*, pp. 18-19. Congress has, however, provided many tools and powers to strengthen the PBGC's finances, including increased premiums,[11] liens that may be perfected outside of bankruptcy,[12] increased employer termination liability,[13] additional claims under the Internal Revenue Code for an "accumulated funding deficiency" whether or not such claims are treated as taxes in a bankruptcy,[14] and the imposition of joint and several liability for all members of an employer's controlled group.[15] The PBGC, armed with the "big stick" of potential plan termination, has also been able to obtain increased plan funding and security for such funding through its "Early Warning System," which monitors transactions proposed to be undertaken by companies largely not in bankruptcy.[16]

Thus, the PBGC has achieved three consecutive, substantial annual surpluses in the single employer program of $869 million, $3.481 billion, and $5.012 billion. While the PBGC obviously would like to further improve its financial recoveries in a bankruptcy, that desire does not constitute a basis for granting the petition. The importance of a regulatory agency's policies simply does not

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[11] 29 U.S.C. § 1306; *see also LTV Corp.*, 496 U.S. at 638.

[12] 29 U.S.C. § 1368.

[13] 29 U.S.C. § 1362(b)(1); *see also LTV Corp.*, 496 U.S. at 638 n.2.

[14] 26 U.S.C. § 4971; *see United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

[15] 29 U.S.C. § 1362(a).

[16] 1998 PBGC Ann. Rep. 14 ("During 1998, PBGC negotiators reached agreements valued at nearly $1.1 billion with 35 companies, including Pepsico, Fruit of the Loom, Sunbeam, Pillowtex, and Inland Steel Company. These agreements provided contributions, security, and other protections for the pensions of about 257,000 workers and retirees.").

provide a basis for the courts to adjust the treatment of an agency's claim in a bankruptcy proceeding, a matter which is instead a "legislative decision." *Nathanson* v. *NLRB*, 344 U.S. 25, 28-29 (1952).

## II. THE TENTH CIRCUIT CORRECTLY DETERMINED THE PRIORITY OF THE PBGC'S MINIMUM FUNDING CLAIMS

There is no compelling reason for this Court to review the court of appeals' determination that the PBGC's minimum funding claims are not entitled to administrative priority under the Bankruptcy Code Section 503(b)(1)(A).[17] It is well established—and the PBGC does not appear to dispute—that it is the Bankruptcy Code which determines the priority of a claim in bankruptcy. *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). The court of appeals' decision interpreting the priority provisions of the Bankruptcy Code is consistent with the decisions of two other courts of appeals and the overwhelming body of other case law on precisely the same question. It is also consistent with the analysis uniformly employed to determine whether a claim qualifies as an administrative expense under the Bankruptcy Code, as well as this Court's decision in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), which requires that a bankruptcy claim arise postpetition in order to be considered an administrative claim.

1. The two courts of appeals other than the Tenth Circuit that have addressed the priority of the PBGC's contribution claims have agreed that minimum funding

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[17] The bankruptcy court held that the portion of the PBGC's minimum contribution claim attributable to the post petition service of employees (the "normal cost") was entitled to administrative expense status. Pet. App. 67a-68a. The only issue litigated on appeal has been the status of the non-normal cost component of the contribution claim.

claims not attributable to the normal cost do not arise postpetition, are based on the prepetition labor of employees, and thus are prepetition claims not entitled to administrative expense status. *PBGC* v. *Sunarhauserman, Inc. (In re Sunarhauserman, Inc.)*, 126 F.3d 811, 817-18 (6th Cir. 1997); *PBGC* v. *LTV Corp.*, 875 F.2d 1008, 1019 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990).[18]

Lower court decisions that have addressed the same issue are in accord. *See LTV Corp.* v. *PBGC (In re Chateaugay Corp.)*, 115 B.R. 760, 774-75 (Bankr. S.D.N.Y. 1990) ("*LTV I*"), *aff'd*, 130 B.R. 690, 697 (S.D.N.Y. 1991) ("*LTV II*"), *vacated on consent of the parties*, 17 Empl. Ben. Cas. (BNA) 1102 (S.D.N.Y. 1993); *In re Finley, Kumble, Wagner, Heine, Underburg, Manley, Myerson & Casey*, 160 B.R. 882, 892 (Bankr. S.D.N.Y. 1993);[19] *In re Kent Plastics Corp.*, 183 B.R. 841, 847 (Bankr. S.D. Ind. 1995); *In re Simetco*, 1996 Bankr LEXIS 1399 (Bankr. N.D. Ohio 1996).[20]

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[18] These decisions linking the priority of benefit fund contributions to the time when the labor providing the consideration for such contributions was provided are also consistent with the provisions of 11 U.S.C. § 507(a)(4). Section 507(a)(4) provides a prepetition priority for benefit fund contributions "arising from services rendered" within a certain period prior to the filing of the bankruptcy petition. The PBGC asserted and was granted priority treatment pursuant to Section 507(a)(4) for certain of its contribution claims. Pet. App. 64a-67a. The PBGC's assertion that contribution obligations are separate from obligations to participants, Pet. 28, is inconsistent with the clear provisions of Section 507(a)(4), as well as Section 503(b)(1)(A) and applicable case law.

[19] The *Finley, Kumble* court noted that the vacatur of the *LTV* decisions does not undermine the persuasive authority of these "logical and well reasoned decision[s]." *Finley, Kumble*, 160 B.R. at 898.

[20] PBGC attempts to create a body of conflicting law where none exists. Pet. 20 n. 14, 26. It cites three cases which did not involve

2. This case law is also consistent with the analysis utilized by the courts of appeal generally for determining whether a claim is entitled to administrative expense status. In *Cramer* v. *Mammoth Mart., Inc. (In re Mammoth Mart)*, 536 F.2d 950, 954-55 (1st Cir. 1976), the First Circuit, reviewing prior case law, including this Court's decision in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968), articulated the now widely accepted standards for determining when a claim in bankruptcy arises and the resulting priority of the claim. The court held that a "claim," defined by the Bankruptcy Code as a "right to payment," [21] is entitled to administrative priority status

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claims by the PBGC and which are not relevant here. The decisions in *In re Penn Cent. Transp. Co.*, 484 F.2d 1300 (3d Cir. 1973), and *Tate* v. *New York, N.H. & H.R.R.*, 332 F.2d 449 (2d Cir. 1964), arose pre-ERISA under the former Bankruptcy Act's specialized provisions and past practice concerning railroad reorganizations, cases where the railroad's general authority to pay pension benefits was not challenged and where the courts emphasizd the unique characteristics of the railroad industry. As this Court noted in relation to bankruptcy provisions prohibiting any modification of railroad collective bargaining agreements, such provisions "are reflective of longstanding special treatment afforded railway labor." *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 522 n. 8 (1984) (citation omitted).

The decision in *Wyle* v. *Pacific Maritime Ass'n (In re Pacific Far East Line, Inc.)*, 713 F.2d 476 (9th Cir. 1983), another Bankruptcy Act case, is similarly irrelevant. It concerned undefined "benefit fund" contributions which, unlike the claims here, were for post-petition services, but "were computed with reference to" hours worked prepetition, which were merely "units of measure." *Id.* at 479.

A fourth case, *Columbia Packing Co.* v. *PBGC*, 81 B.R. 205 (D. Mass. 1988), is a badly reasoned and singular departure from consistent precedent, including decisions of the First Circuit. *See infra*, pp. 15-16 n. 23.

[21] Section 101(5)(A) of the Bankruptcy Code defines "claim" broadly as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, ma-

only to the extent that it arises postpetition out of a transaction or relationship with the debtor-in-possession, separate from any preexisting obligation, and that a contractual claim will be afforded administrative claim status only when the underlying consideration was supplied to and beneficial to the debtor-in-possession.[22] *Mammoth Mart*, 536 F.2d at 954-55. *Accord Isaac* v. *Temex Energy, Inc. (In re Amarex)*, 853 F.2d 1526, 1531 (10th Cir. 1988); *Christian Life Ctr. Litig. Defense Comm.* v. *Silva*, 821 F.2d 1370, 1374 (9th Cir. 1987); *Trustees of Amalgamated Ins. Fund* v. *McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986); *Matter of Jartran*, 732 F.2d 584, 587 (7th Cir. 1984).

Many of these decisions carefully distinguish between the time when, for bankruptcy purposes, the "claim" arises, *i.e.*, when the acts giving rise to the "right to payment" are performed, and the time when a cause of action accrues, *i.e.*, when the obligation comes due and is not met. *See, e.g., Sunarhauserman*, 126 F.3d at 819; *Amarex*, 853 F.2d at 1531; *McFarlin's* 789 F.2d at 101; *see also LTV I*, 115 B.R. at 775. The Tenth Circuit's decision was consistent with this line of authority in determining that the PBGC's minimum funding contribution claim is entitled to administrative expense priority only to the extent it is based upon services provided postpetition. Pet. App. 9a-13a; *see also Sunarhauserman*, 126 F.3d at 817 ("an absolute requirement for administrative expense priority [is] that the liability at issue arise postpetition").[23]

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tured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A).

22 The court was interpreting general statutory provisions regarding administrative claims, rather than bankruptcy legislation aimed at specific claims. *See infra*, p. 18.

23 In *Columbia Packing*, 81 B.R. at 210-11, the only case that awarded administrative expense status to the PBGC's contribution

3. The decision below is also consistent with the decision of this Court in *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). In *Reading*, this Court held that the *post-petition* negligence of a bankruptcy trustee gave rise to an administrative tort claim by the injured party under the former Bankruptcy Act as an "actual and necessary cost" of administration of the bankruptcy estate (regardless of whether payment was essential to the reorganization of the business), because the acts giving rise to the claim—a fire which spread to a neighboring property—occurred postpetition. *Id.* at 484. The court of appeals' decision was consistent with *Reading* in holding that the PBGC's minimum funding contribution claim (other than the normal cost) is not entitled to administrative priority because the acts giving rise to the claim, the employees' services, occurred prepetition.

The PBGC, citing *Reading* and other cases (Pet. 25 n.17, 26-27, 28 n.19, 29 n.20), argues that its minimum funding claim is statutory or regulatory in nature and automatically entitled to administrative claim status because it falls due postpetition. As noted, PBGC fails to recognize that the acts giving rise to the tort claim in *Reading* occurred postpetition. PBGC also fails to recognize that courts have afforded administrative claim status to certain environmental claims,[24] tax claims under the

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claim, the court departed from this otherwise consistent analysis, confused a claim with a cause of action, and essentially rested priority on the date the contributions were due. *See LTV I*, 115 B.R. at 777 (criticizing *Columbia Packing* and its departure from established framework for determining administrative expense status).

[24] *Cumberland Farms* v. *Florida Dep't of Envtl Protection*, 116 F.3d 16, 20-21 (1st Cir. 1997) (fine for debtor's postpetition violation of state environmental laws); *Alabama Surface Mining Comm'n* v. *N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) (penalty for debtor's postpetition violation

Coal Industry Health Benefit Act,[25] and other claims involving regulatory schemes[26] because in these cases the claims, whatever the label, also arose postpetition. Thus, the alleged "statutory" nature of a claim is not determinative of administrative priority. In any event, the contribu-

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of state environmental laws); *United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (claim for government reclamation costs incurred postpetition); *Lancaster* v. *Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123-124 (6th Cir. 1987) (claim for state clean-up costs based on bankruptcy trustee's failure to maintain estate postpetition in accordance with state environmental laws); *compare In re Bill's Coal Co.*, 124 B.R. 827, 829-30 (D. Kan. 1991) (penalties assessed for prepetition violation of state environmental laws are not administrative expenses).

[25] *UMWA 1992 Benefit Plan* v. *Rushton (In re Sunnyside Coal Co.)*, 146 F.3d 1273, 1279 (10th Cir. 1998) (Coal Act premiums accrued postpetition constituted a "tax" incurred by the estate and entitled to priority under 11 U.S.C. § 503(b)(1)(B); *Adventure Resources, Inc.* v. *Holland*, 137 F.3d 786, 794-95 (4th Cir.) (Coal Act premiums constituted a "tax" which arose postpetition after the Funds' entitlement to premiums came into effect), *cert. denied*, 119 S. Ct. 404 (1998); *LTV Steel Co.* v. *Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 497 (2d Cir. 1995) (obligation to contribute to coal miners' health fund was administrative expense because it was an obligation which arose from the Coal Act, which was enacted six years after Chapter 11 petition filed; obligation also was an administrative expense as "tax" incurred by the estate).

[26] *Potter* v. *CNA Ins. Co. (In re MEI Diversified, Inc.)*, 106 F.2d 829, 831-32 (8th Cir. 1997) (penalty for postpetition failure to meet obligation to pay workers' compensation insurance premiums, where payment was required under state law in order for employer to be permitted to operate); *Spunt* v. *Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200, 202 (1st Cir. 1985) (postpetition violation of injunction against nuisance); *Yorke* v. *NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983) (bankruptcy trustee's postpetition failure to bargain over effects of postpetition shutdown in violation of labor law).

tion claims involved here are contractual in nature and arose prepetition.[27]

As the PBGC has previously acknowledged, there is no statutory obligation for an employer to establish a pension plan. The minimum funding provisions of ERISA and the Internal Revenue Code create a mandatory schedule pursuant to which employers who have established pension plans are required to amortize their contractual liability for their employees' past service credit. The obligation to pay—and the "right to payment"—arise from the labor of the employer's employees. The court of appeals properly determined that the timing of that labor determines the priority status of the PBGC's minimum funding claim.

4. As this Court emphasized nearly half a century ago, in bankruptcy, "if one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson*, 344 U.S. at 29. Of course, Congress can effectuate policies it deems important by amending the Bankruptcy Code to explicitly provide priority treatment for a claim that might otherwise not be entitled to such treatment. Congress did just that when it enacted Section 1114 of the Code, 11 U.S.C. § 1114, following LTV's postpetition, unilateral termination of medical benefits for retirees largely represented by the USWA. Congress provided that the payment of retiree benefits due during the bankruptcy "has the status of an allowed administrative expense." 11 U.S.C. § 1114(e)(2).

Between 1991 and 1993, in a series of proposed bills, the PBGC and its allies sought congressional reversal of

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[27] The dissent in *Sunarhauserman* mistakenly viewed the obligation as "statutory," and then mistakenly concluded that all statutory claims were entitled to administrative claim status. *Sunarhauserman*, 126 F. 2d at 822 (dissenting opinion).

the *LTV* decisions denying administrative priority to the PBGC's minimum contribution claims. *See, e.g.*, 102 H.R. 3843, 102nd Cong., 1st Sess. (1991) (a bill to, *inter alia*, amend Section 503 of the Bankruptcy Code to provide administrative priority status to unpaid pension fund contributions); 102 H.R. 4200, 102nd Cong., 2d Sess. (1992) (same); 102 H.R. 4545, 102nd Cong., 2d Sess. (1992) (same); 102 S. 2014, 102nd Cong., 1st Sess. (1991) (same); 102 S. 2485, 102nd Cong., 2d Sess. (1992) (same); *see also* 138 Cong. Rec. S. 8241, 8268-69 (1992) (statement of Sen. Graham regarding proposed 102 S. 1985, 102nd Cong., 2nd Sess. (1992)); 139 Cong. Rec. S2610-2613 (1993) (statements of Sens. Heflin and Grassley regarding proposed amendments to proposed 103 S. 540, 103rd Cong., 1st Sess. (1993)); *Finley, Kumble*, 160 B.R. at 893 n.24 (reviewing legislative proposals). These efforts were all unsuccessful. There is no reason for this Court to step in where Congress has chosen not to tread.

## III. THE TENTH CIRCUIT CORRECTLY DETERMINED THE DISCOUNT RATE TO BE UTILIZED IN ALLOWING THE PBGC'S UBL CLAIM

There is no compelling reason for this Court to review the Tenth Circuit's determination that the PBGC's UBL claim can only be allowed utilizing a discount rate consistent with the Bankruptcy Code. The regulation advanced by the PBGC in this case is obsolete and inappropriate for review. There is no conflict among the courts of appeals. The decision below is consistent with the only other two decisions on point, and was mandated by the requirements of 11 U.S.C. § 502(b) that claims be valued as of the date of the bankruptcy petition. PBGC's heightened rhetoric cannot obscure a relatively narrow and unremarkable issue involving the allowance of the PBGC's claim in bankruptcy using an interest rate that is consistent with the Bankruptcy Code.

1. Because the regulation regarding valuation of plan benefits on which the PBGC centers its case has been amended since the determination of the PBGC's claim in this case, this is not an appropriate case for review. The PBGC concedes that the regulation has been superseded. Pet. 6 n.5. In 1993, among other changes, the PBGC updated the mortality tables, eliminated an adjustment to the interest rate for administrative expenses in favor of a separate load charge for expenses, and adopted a new structure of interest assumptions based on the length of time between the valuation date and the presumed date of each payment. *See* 58 Fed. Reg. 50812 (September 28, 1993). Among the PBGC's stated reasons for the changes was the need to address an apparent "disparity between the PBGC's low interest rates and familiar private sector rates" for group annuity contracts and to "more clearly conform to the current practices of the private insurance industry in pricing" such contracts. *Id.*[28] Because the valuation regulation which the PBGC seeks to apply to its UBL claim is now obsolete, the Petition should not be granted.

2. The decision of the court of appeals is not in conflict with the decision of any other court of appeals, and, as conceded by the PBGC (Pet. 14 n.10), is in complete accord with the only two other court decisions on this issue, both of which utilized the "prudent investor" discount rate adopted here. *LTV II*, 130 B.R. at 695-96 and *LTV Corp.* v. *PBGC (In re Chateaugay)*, 126 B.R. 165 (Bankr. S.D.N.Y. 1991) ("*LTV III*"), *vacated on consent of the parties*, 17 Empl. Ben. Cas. (BNA) 1102 (S.D.N.Y. 1993); *Belfance* v. *PBGC (In re CSC Industries, Inc.)*, No. 95-4103 (Bankr. N.D. Ohio Dec. 3,

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[28] The 1993 regulation was later replaced by the current version of the regulation. 61 Fed. Reg. 34002 (July 1, 1996).

1997), *appeal docketed*, No. 4:99CV00041 (N.D. Ohio Jan. 8, 1999).[30]

3. The court of appeals' decision was mandated by Section 502(b) of the Bankruptcy Code. Section 502(b) requires that the bankruptcy court "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition." 11 U.S.C. § 502(b). Consistent with the requirements of Section 502(b), where a claim is comprised of future liabilities to be paid over time, the claim must be reduced to present value so that its value does not exceed the value of similarly situated claims. *LTV III*, 126 B.R. 165, 175 (Banker S.D.N.Y. 1991); *In re Caudill*, 82 B.R. 969, 976-77 (Bankr. S.D. Ind. 1988). The use of a low interest rate designed to achieve agency-specific institutional goals to calculate a bankruptcy claim is not consistent with bankruptcy law.

In applying Section 502(b), the court of appeals correctly followed established principles of claims determination. As this Court recognized in *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161-62 (1946), a case not cited in the Petition, once the bankruptcy court calculates the gross value of a claim under nonbankruptcy law, it must then "decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act." *Id.* at 162.[30]

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[29] The PBGC's fear that because there are two levels of review of a bankruptcy court's decision, *see* 28 U.S.C. § 158, a "conflict" may be long in the making (Pet. 20), is pure conjecture and does not provide grounds to grant the Petition.

[30] The leading bankruptcy treatise (one section of which is cited out of context by the PBGC (Pet. 23)), confirms that after a bankruptcy court determines the amount of a claim under nonbankruptcy law, it must determine the allowability of the claim under

In holding that a claim for interest on interest was not allowable under the Bankruptcy Act,[31] the *Vanston* Court reviewed bankruptcy considerations at the claims allowance stage. In determining what claims are allowable under bankruptcy law, the Court held that "bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles." *Id.* at 162-63. *See also LTV I*, 115 B.R. at 769-70.[32]

Thus, in discounting claims for future payments to their present value, a bankruptcy court must determine the discount rate that is appropriate to calculate the claim as a matter of bankruptcy law. *See LTV I*, 115 B.R. at 769-770; *LTV III*, 126 B.R. at 172; *Caudill*, 82 B.R. at 978.[33] Consistent with the determination of a claim payable in the future, the rate must reflect the amount of

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bankruptcy law. *Compare* 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 502.03[1][a] (15th rev. ed. 1998) *with id.* at ¶ 502.03 [1][c] (". . . although the existence of a claim is controlled by state or other federal law, the allowance or disallowance of a claim in bankruptcy is a matter of federal law left to the bankruptcy court's exercise of its equitable powers.").

31 Precedent under the Bankruptcy Act remains pertinent to current bankruptcy jurisprudence. *See CF&I*, 518 U.S. at 220-21; *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990).

32 Administrative law cases cited by the PBGC, Pet. 22-23, did not involve bankruptcy claim proceedings and are not relevant here. Indeed, as the court of appeals emphasized, ERISA's definition of the PBGC's termination claim is provided for purposes of ERISA only. Pet. App. 13a.

33 Bankruptcy courts "are often and routinely called upon to determine the present value of projected future payments, the value of a claim payable over time, and the value of a recovery which is in the form of payments over time pursuant to a plan of reorganization." *LTV I*, 115 B.R. at 769.

money needed to fulfill the obligation in the future. Courts that have considered this issue have utilized "the rate of return available to a reasonable, prudent, pension fund investor who invests in a 'prudent' portfolio." *LTV III*, 126 B.R. at 177.

By contrast, the low discount rate selected by the PBGC is, as PBGC concedes, intended to replicate the price to be charged by a private insurer issuing an annuity contract; is designed to deter an employer from terminating a plan by inflating the size of the UBL claim; and is not intended to reflect the future earning power of money "but instead serves to promote the PBGC's own institutional goal of making plan terminations less attractive than the purchase of closeout annuities." Pet. App. 36a. As such, the artificially low rate contrived by the PBGC would enhance its claim well beyond the amount needed to fund the benefits in the future, and would result in a greater pro rata recovery than similarly situated creditors.[34]

4. The application of Section 502(b) manifests the Bankruptcy Code's guiding principle that similarly situated creditors receive equal treatment.[35] That equal treatment may result in a dichotomy between a liability under non-

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[34] Thus, to the extent that the PBGC has suffered a "loss" as a result of this plan termination (*compare supra*, pp. 4-5 n. 5), that loss is not "nearly a quarter of a billion dollars," (Pet. 3), which is the liability established under ERISA to promote the PBGC's institutional goals. Rather, the "loss" is $124,441 million, the bankruptcy claim allowed below, which reflects the actual economic value of the PBGC's "loss" measured by use of a discount rate consistent with the requirements of the Bankruptcy Code.

[35] *Begier* v. *IRS*, 496 U.S. 53, 58 (1990); *Embassy Restaurant*, 359 U.S. at 31; *Nathanson*, 344 U.S. at 29. *See also In re O.P.M. Leasing Servs., Inc.*, 79 B.R. 161, 167 (Bankr. S.D.N.Y 1987) ("To assure equality of treatment of creditors at distribution" such creditor "should be entitled to collect from the debtor only the discounted value of his claim as of the petition date.")

bankruptcy law and a claim as measured in a bankruptcy proceeding is not in any way unusual or unprecedented. By virtue of the bankruptcy court's authority—and mandate—to maintain the equality of treatment of similarly situated creditors and to determine allowability pursuant to bankruptcy law, the value of any claimant's bankruptcy claim may well diverge from the claimant's rights to recovery under nonbankruptcy law.[36]

In the analogous context of the interest rate to be applied to Internal Revenue Service claims for deferred payments of federal taxes owed by a debtor, courts have disregarded the statutory interest rate provided for by Internal Revenue Code § 6621, 26 U.S.C. § 6621. They have concluded that such a rate serves the federal tax objective of deterring taxpayers from "borrowing" from the Internal Revenue Service, and that bankruptcy principles governing the treatment of claims require application of a market rate approximating the rate at which the debtor could obtain a loan from a commercial lender of equivalent amount and duration.[37]

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[36] *See Associates Commercial Corp.* v. *Rash*, 520 U.S. 953 (1997) (rejecting a state-law based "replacement value" standard under Section 506(a) because "the Bankruptcy Code has reshaped debtor and creditor rights in marked departure from state law."); *Novak* v. *Callahan (In re GAC Corp.)*, 681 F.2d 1295, 1301 (11th Cir. 1982) (claims for punitive damages disallowed under Bankruptcy Act as matter of bankruptcy policy; if allowed, such claims would compel innocent creditors to pay for debtors' wrongdoing); *cf. In re Allegheny Int'l, Inc.*, 100 B.R. 247 (Bankr. W.D. Pa. 1989) (unmatured interest disallowed under Code Section 502(b)(2), even where parties attempt to override Code by provision in contract).

[37] *See, e.g., United States* v. *Camino Real Landscape Maint. Contractors, Inc. (In re Camino Real Landscape Maint. Contractors, Inc.)*, 818 F.2d 1503, 1507 (9th Cir. 1987) (the rate provided in the IRC "reflects tax objectives, not those of bankruptcy law"); *United States* v. *Neal Pharmacal Co.*, 789 F.2d 1283, 1287-89 (8th Cir. 1986); *In re Trevarrow Lanes, Inc.*, 183 B.R. 475, 481-82

5. The PBGC emphasizes its frustration with the overall bankruptcy process in attempting to convince this Court to review the decision of the court of appeals and adjust the treatment of the PBGC's UBL claim in bankruptcy. The PBGC finds fault with the pressure in a bankruptcy setting to compromise claims; the alleged double reduction of its termination claim as a function of determining the true economic value of the claim and the ultimate pro rata distribution to unsecured creditors; and the inherent legal and factual uncertainties in the process. Pet. 14, 16, 19-20. The PBGC fails to acknowledge, however, that similar frustrations are borne by all creditors. Government creditors are bound by the general rules applicable to all creditors. *See United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983). The PBGC's desire for individualized rules uniquely applicable to the agency's bankruptcy claims are appropriately directed to Congress and do not raise issues meriting review by this Court.

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(Bankr. E.D. Mich. 1995); *In re Mansfield Tire & Rubber Co.*, 152 B.R. 477, 484-85 (Bankr. N.D. Ohio 1993).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD M. SELTZER
*Counsel of Record*
BABETTE A. CECCOTTI
ANN E. O'SHEA
COHEN, WEISS AND SIMON
330 West 42nd Street
New York, NY 10036
(212) 563-4100

CARL B. FRANKEL
*General Counsel*
PAUL WHITEHEAD
*Assistant General Counsel*
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222
(412) 562-2400

*Attorneys for the United Steelworkers of America. AFL-CIO-CLC*